

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION** **RECEIVED - FCC**  
 Washington, D.C. 20554

AUG 25 2003

In the matter of )  
 )  
 Amendment of Section 73.202(b) )  
 Table of Allotments, )  
 FM Broadcast Stations )  
 (Montauk, New York) )

Federal Communication Commission

Bureau / Office

**MB Docket No. 03-155**  
 RM-10735

**RECEIVED**

AUG 25 2003

To Chief, Audio Division  
 Media Bureau

Federal Communications Commission  
 Office of the Secretary

**COMMENTS OF AAA ENTERTAINMENT LICENSING LLC**

1 AAA Entertainment Licensing LLC ("AAA")<sup>1</sup> hereby submits these comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding.<sup>2</sup> The proposal looks toward the allotment of FM Channel 261A at Montauk, New York.

2 As noted in the NPRM,<sup>3</sup> any reference point for a Channel 261A allotment must be located to the east of Montauk in order to avoid short-spacing to WEZN-FM, Channel 260B, Bridgeport, Connecticut.<sup>4</sup> The map showing the available area is difficult to read in the Commission's Electronic Comment Filing System ("ECFS"), because it

<sup>1</sup> AAA is the licensee of Stations WBEA(FM), Southold, WBAZ(FM), Bridgehampton, WEHM(FM), Southampton, and WHBE(FM), Easthampton, all New York. The service area of a new station at Montauk would overlap some, if not all, of the service areas of AAA's stations

<sup>2</sup> DA 03-2104, released July 3, 2003.

<sup>3</sup> Par 2C.

<sup>4</sup> The reference point proposed by the Petitioner is actually only 112.48 km from the licensed main transmitter site of WEZN-FM. That rounds to 112 km as the nearest whole number and thus falls short of the 113 km required by Section 73.207(b)(1) of the Rules.

2003 08/27

appears as white on a black background. Attached hereto as Exhibit 1 is a map, prepared for AAA by the engineering consulting firm of CMBE, Inc. This map is clearer than the Petitioner's map and shows that virtually all of the available area for a fully-spaced reference point is in environmentally-sensitive park areas, where construction of a tower would be forbidden by local land use regulation and/or would have an adverse environmental impact<sup>5</sup> Because there is no fully-spaced land area where tower construction has any reasonable chance of approval, the allotment proposal must fail.

3 The Commission has stated that.

The underlying requirement for an allotment is the reasonable expectation that a useable [*sic*] site is available in compliance with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. *San Clemente, CA*, 3 FCC Rcd 6728 (1988).<sup>6</sup>

In this case, while the NPRM appears to have followed the normal presumption, because site availability is not addressed, there is substantial evidence that no site is available, so the presumption is rebutted. The burden now shifts to the Petitioner to establish site availability<sup>7</sup>

---

<sup>5</sup> Exhibit 2 hereto is a print-out from the New York State Parks website showing Montauk State Park in more detail

<sup>6</sup> *Appeal denied sub nom Mount Wilson FM Broadcasters, Inc v. FCC*, 884 F.2d 1462 (D.C. Cir., 1989)

<sup>7</sup> See Sec. 73.208(a)(2) of the Rules "A showing indicating the availability of a suitable site should be submitted with the petition." See also *Radio Hyannis, Inc. (WPXC)*, Media Bureau Letter of March 31, 2003 re BPH-20010413AAI, a copy of which is attached hereto as Exhibit 3 for ready reference. It is clear from the *WPXC* case that a fully-spaced reference site must be available, even if an ultimate applicant requests construction permit at a short-spaced site pursuant to Section 73.215 of the Rules.

4 The Commission will “take into account a showing by a party that, in reality, no theoretical sites exist because of environmental, air hazard, or other similar considerations.” *West Palm Beach, FL*, 6 FCC Rcd 6975, 6976 (1991). In this case, the obstacles to tower construction are environmental and are buttressed by concerns expressed in the local community

5 As shown by the attached map, most of the fully-spaced area is in or near Montauk State Park. The Montauk Point Lighthouse is located in Montauk State Park, is 207 years old, and is No. 69000142 in the National Register of Historic Places.<sup>8</sup> The views of and from this lighthouse are directly protected under Section 1.1307(a)(4) of the Commission’s Rules and would be impaired by construction of a nearby tower. A full environmental assessment would be required, and the results would likely be adverse.

6 Local citizens have expressed concern about the impact of construction of a tower in either park or non-park areas and would oppose any tower construction. A letter from the president of Concerned Citizens of Montauk, Inc. indicating that existing structures are being dismantled, let alone new ones being built, is attached as Exhibit 5.

7 A search of the Commission’s Antenna Structure (“ASR”) database shows no registered towers within 5 km. of the proposed site.<sup>9</sup> Thus there is no existing tower that can be used, and it will not be possible to construct a new station at a fully-spaced site without constructing a new tower.

---

<sup>8</sup> See <http://www.cr.nps.gov/maritime/light/montauk.htm>. The lighthouse also has its own website at <http://www.montauklighthouse.com/home.htm>. Print-outs from those websites are attached as Exhibit 4.

8 The foregoing showing is sufficient to make a *prima facie* case that there is no fully-spaced reference site where it would be possible to construct a new station on Channel 261A. Accordingly, unless the Petitioner can prove that an actual site is available where permission may be realistically obtained to construct, the allotment must be denied under numerous cases, including *San Clemente* and *Radio Hyannis*, *supra*. AAA does not believe that the Petitioner can meet its burden anywhere in the geographically small and environmentally sensitive fully-spaced area.

Respectfully submitted,



Peter Tannenwald

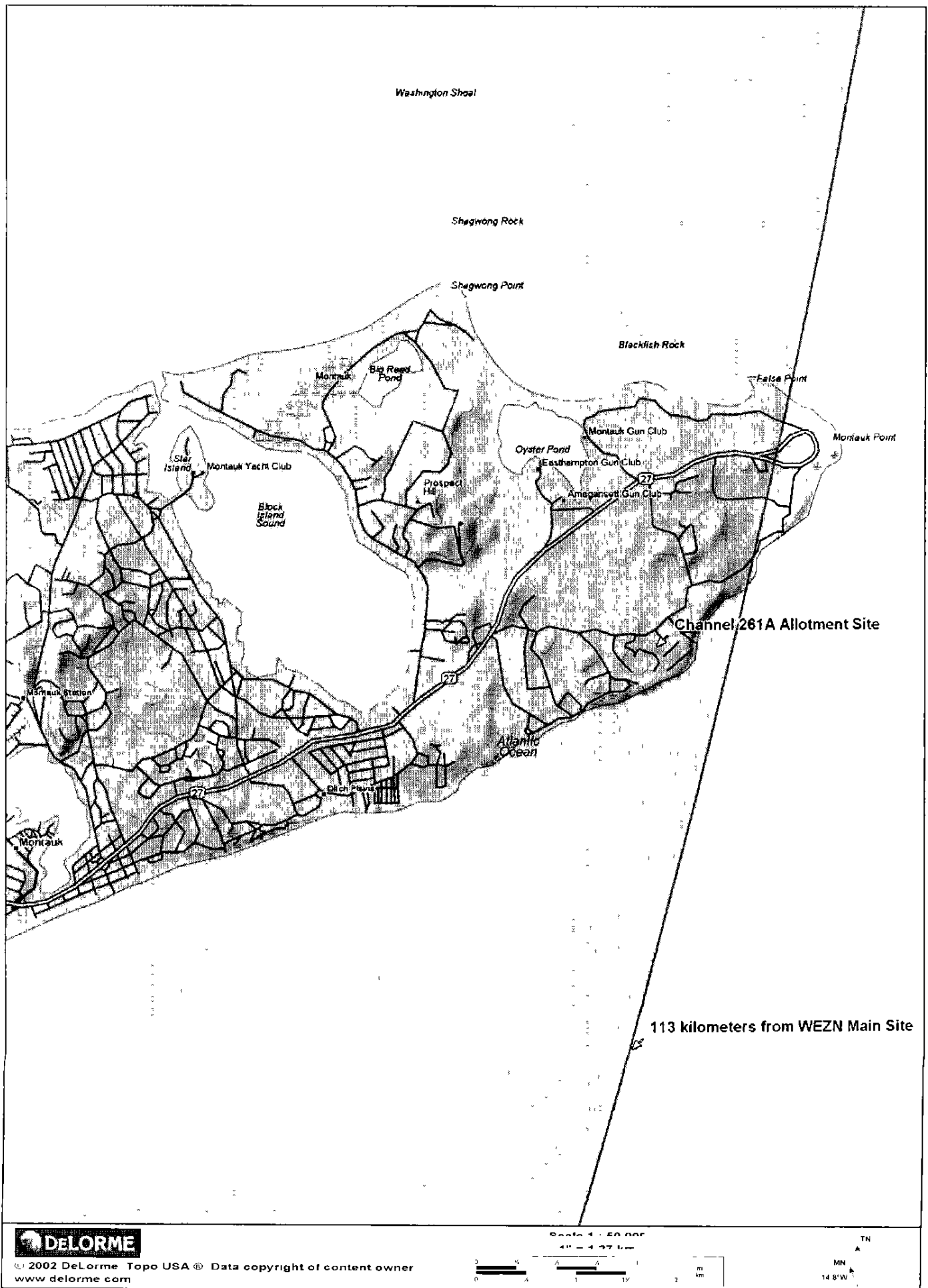
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Ave., N.W., Suite 200  
Washington, DC 20036-3101  
Tel. 202-728-0400  
Fax 202-728-0354

August 25, 2003

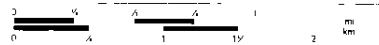
Counsel for AAA Entertainment  
Licensing LLC

---

<sup>9</sup> On the assumption that the coordinates in the NPRM are NAD27 coordinates, they were converted to NAD83, and the ASR search was done around 41-03-13 3 N.L., 71-52-41 2 W L.

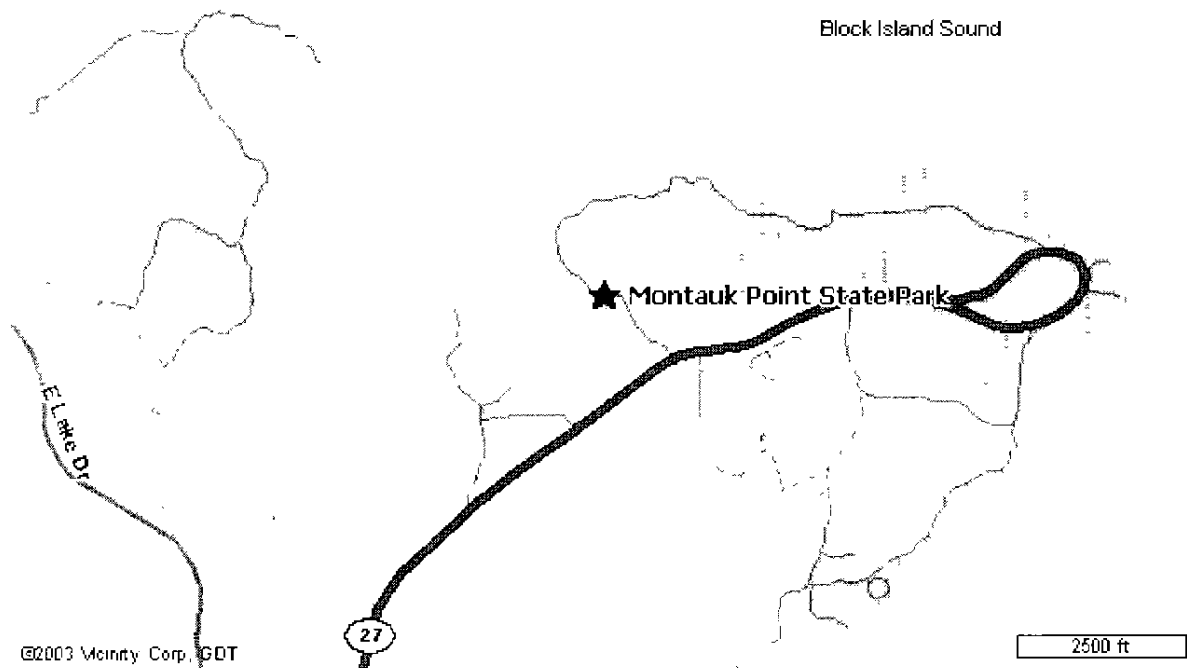


© 2002 DeLorme Topo USA® Data copyright of content owner  
www.delorme.com



TN  
A  
MN  
14 8°W

113 kilometers from WEZN Main Site



## Montauk Point State Park

50 South Fairview Avenue  
 Montauk, NY 11954  
 Phone (631) 668-3781

Montauk Point State Park, a heavily-wooded tundra leading to the eastern tip of Long Island and the historic Montauk Lighthouse, offers some of the best surf fishing in the world. The view is unique, because, when the water is calm, visitors can clearly see the "race" of converging tides from the Atlantic and Block Island Sound. Visitors can also picnic at tables under the pine trees, use the nature trails to hike or cross-country ski, or spend time watching the seals sun on the rocks offshore.

**Directions** 132 miles from Manhattan, via Sunrise Hwy (Route 27) east to the Park

**Seasons/Hours** Park is open year round, sunrise to sunset. Big game and small game hunting are permitted in season.

*Information above is from the New York State Parks, Recreation and Historic Preservation website at <http://nysparks.state.ny.us/cgi-bin/cgiwrap/nysparks/parks.cgi?pl125>*

**FEDERAL COMMUNICATIONS COMMISSION**

445 12<sup>th</sup> Street SW  
WASHINGTON DC 20554

MEDIA BUREAU  
AUDIO DIVISION  
TECHNICAL PROCESSING GROUP  
APPLICATION STATUS (202) 418-2730  
HOME PAGE [www.fcc.gov/mb/audio/](http://www.fcc.gov/mb/audio/)

PROCESSING ENGINEER Dale Bickel  
TELEPHONE (202) 418-2700  
FACSIMILE (202) 418-1411  
MAIL STOP 2 B450  
INTERNET ADDRESS [dbickel@fcc.gov](mailto:dbickel@fcc.gov)

March 31, 2003

Mr. John F. Garziglia  
Ms. Joan Stewart  
Pepper & Corazzini  
1776 K Street, Suite 200  
Washington, D.C. 20006-2334

Mr. Peter Tannenwald  
Irwin, Campbell & Tannenwald  
1730 Rhode Island Avenue NW  
Washington, D.C. 20036-3101

In re WPXC, Hyannis, MA  
Radio Hyannis, Inc.  
Facility ID No. 54620  
Application File No: BPH-20010413AAI

Dear Counsel:

This letter is in reference to (i) the above-captioned one-step upgrade application, filed by Radio Hyannis, Inc. ("Radio Hyannis") to upgrade FM station WPXC from Class A to Class B1;<sup>1</sup> (ii) the Informal Objection filed by AAA Entertainment Licensing LLC ("AAA") on June 25, 2001;<sup>2</sup> (iii) the staff's letter dated July 30, 2001, (iv) Radio Hyannis' August 30, 2001 technical amendment, and (v) all other related pleadings filed by the parties.

---

<sup>1</sup> A "one-step" application to upgrade consists of two parts. The applicant must first show that there exists a suitable fully spaced allotment site meeting the minimum separation requirements of 47 CFR Section 73.207 with respect to all other stations, prior filed applications, and allotments. The allotment site must also provide 70 dBu coverage over the entire community of license. Second, the applicant must specify the transmitter site from it proposes for operation, which can employ the lesser spacings provided contour protection is afforded by 47 CFR Section 73.215.

<sup>2</sup> AAA Entertainment Licensing, LLC is the licensee of station WAKX (FM), Narragansett Pier, RI.

## **Radio Hyannis' Allotment Reference site**

Radio Hyannis' original application specified coordinates on Hallets Rock, which lies offshore south of Hyannis, MA. The proposal was silent to the suitability of the site. AAA's Informal Objection contends that Hallets Rock is unusable and unsuitable as an allotment reference site, having no inhabitants, electrical, or other services. On July 30, 2001, the staff sent a letter directing Radio Hyannis to file an amendment to show that the proposed allotment site is suitable for construction.

On August 30, 2001, Radio Hyannis amended its application specifying a new allotment reference site on another small offshore island. The amendment describes the new location as:

The proposed allocation site is an island that is the location of a former 65-foot high lighthouse named Bishop and Clerks Light, which stood on the island from 1858 until 1953. The island was once 5 acres in size, and sheep were pastured there. Due to natural processes, the island is smaller today and there is a skeleton day beacon installed to mark the surrounding rocks to ships.

Pictures of the site were included, showing the present beacon on an island not much larger than the light that sits on it. Radio Hyannis includes a statement from a tower construction company stating that it is "very feasible to install a [382 foot self-supporting] tower at this location." Coast Guard radio equipment is said to be operational at this site. Radio Hyannis indicated that a member of the Coast Guard (which maintains the site) knew of no environmental regulations that would block the proposal.

AAA takes issue with Radio Hyannis' conclusions. AAA contends that the site is almost inaccessible, unprotected from severe weather, on an island that is shrinking in size. No indication is given as to whether any employee of the tower company that provided the certification letter ever visited the site. There is no source of available electric power, and that any suggested use of wind or solar power or alternate sources is no more than speculation. AAA states that the site is under Coast Guard jurisdiction, and Radio Hyannis has not made any application to the Coast Guard for its use. AAA states that Coast Guard is not accepting any applications for use of its offshore installations at this time. Finally, AAA hints that the cost of constructing such an operation would be prohibitive. Therefore, AAA recommends denial of the application.

### **Analysis – Use of offshore island allotment reference coordinates.**

The Commission has authorized allotment reference coordinates on offshore islands, but only upon a showing that the site is available and suitable for broadcasting. In *Table of Allotments, Atlantic City, NJ*, 57 RR 2d 1436 (1985), an offshore allotment was deleted when the proponent for the allotment failed to file a construction permit application and no other party filed an application for a fully spaced transmitter site. That allotment had been adopted only after the staff requested data concerning the federal, state, and local requirements applicable to such a location, the petitioner provided "extensive information" to show that there were no unusual problems involved. In *Table of Allotments, Oak Beach and Bay Shore, NY*, 57 RR 2d 1275 (1985) an allotment on Fire Island was accepted where the petitioner was able to secure a lease agreement to use the only available non-short-spaced transmitter site (a lighthouse). In *Table of Allotments, Clewiston, Fort Myers Villas, Indiantown, Jupiter, Key Colony Beach, Key Largo, Marathon and Naples, Florida*, 10 FCC Rcd 6548 (1995) the staff rejected an allotment reference site on Sanibel Island due to its "environmentally sensitive" nature which made the location unusable.



### Analysis – Suitability of Allotment Reference Sites.

We conclude that Radio Hyannis has not established that the proposed allotment sites are suitable for broadcast operation. Radio Hyannis has not provided sufficient information to support the feasibility of broadcast use of either Bishop and Clerks Light or Halletts Rock. Radio Hyannis' conclusions are based on little more than its assumptions concerning the sites' suitability and availability.<sup>3</sup> As stated in *Crestnew and Westbay, Florida*, 7 FCC Rcd 3059 (1992):

The underlying requirement for an allotment is the reasonable expectation that a useable site is available in compliance with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. See *San Clemente, California*, 3 FCC Rcd 6728 (1988), *appeal denied sub nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989) [4].

### Conclusion.

We agree with AAA that Radio Hyannis has failed to establish that an allotment reference site on either Bishop and Clerks Island or Halletts Rock is suitable. Accordingly, AAA's Informal Objection IS GRANTED. Because an acceptable allotment reference site has not been specified, Radio Hyannis' application is unacceptable for filing.<sup>5</sup>

---

<sup>3</sup> *Table of Allotments, Atlantic City, NJ, supra*. In a rulemaking proceeding, 100% of the community of license must be covered by the 70 dBU contour (see, e.g., *Vacaville and Middletown*, 4 FCC Rcd 8315, 8316 (1989), *recon. denied*, 6 FCC Rcd 143 (1991)). The tower company letter submitted by Radio Hyannis provides little assistance to demonstrate that proper coverage can be achieved since it is completely devoid of details pertinent to construction at this site. *Randolph and Brandon, VT*, 6 FCC Rcd 1760, 1764 (1989) at note 4, states:

In rulemaking proceedings to allot FM channels "the question as to the availability and suitability of an antenna site in a marginal situation is important only to the extent of whether, if a channel were to be assigned, there is a reasonable assurance that a station would be able to provide adequate service to the community."

Here, there is an inextricable link between the feasibility of the proposed allotment site for broadcast operation and the ability to provide adequate service to the community of license. Radio Hyannis has not established whether the 70 dBU contour from a feasible operation could completely cover the community of Hyannis.

<sup>4</sup> See also *West Palm Beach, Florida*, MM Docket 87-438, DA-91-1421, 6 FCC Rcd 6975, 6976 ("[w]e will . . . take into account a showing by a party that, in reality, no theoretical sites exist because of environmental, air hazard, or other similar considerations")

<sup>5</sup> Absent an acceptable allotment site, we need not consider the acceptability of the proposed transmitter site.

The staff's July 30, 2001 letter stated that "applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment." See Appendix B in the *Report and Order* in MM Docket No. 91-347, 7 FCC Rcd 5074, 57 Fed. Reg. 34872, released July 27, 1992. The July 30, 2001 letter constituted Radio Hyannis' one opportunity for corrective amendment pursuant to § 73.3522(a)(6). Therefore, application BPH-20010413AAI IS HEREBY DISMISSED. This action is taken pursuant to 47 C.F.R. § 0.283.

Sincerely,



Edward P. De La Hunt  
Associate Chief, Audio Division  
Office of Broadcast License Policy  
Media Bureau

cc Radio Hyannis

## EXHIBIT 4

National Park Service

## MARITIME HERITAGE PROGRAM

Inventory of Historic Light Stations  
New York Lighthouses

[Back to Inventory Home Page](#)  
[Back to Inventory List of New York Lighthouses](#)

MONTAUK POINT  
LIGHT

**State:** NEW YORK  
**Location:** TURTLE HILL /  
EAST END OF LONG  
ISLAND  
**Nearest City:** MONTAUK  
**County:** SUFFOLK  
**U.S.C.G. District:** 1  
**Year Station Established:**  
1796



*Photo courtesy of Ted Smith, September 2002*

**Existing Historic Tower:**

- Year Light First Lit 1797
- Is the Light Operational? YES
- Date Deactivated N/A
- Automated 1987
- Foundation Materials NATURAL/EMPLACED
- Construction Materials SANDSTONE
- Markings/Patterns WHITE W/BROWN BAND MIDWAY & BLACK LANTRN
- Shape OCTAGONAL PYRAMIDAL
- Relationship to Other Structures SEPARATE
- Tower Height 110
- Original Optic 13 WHALE OIL LAMPS
- Year Original Lens Installed 1797
- Present Optic DCB-224
- Year Present Lens Installed 1987
- Height of Focal Plane 168
- Fresnel Lens Disposition THIRD AND ONE HALF ORDER LENS USED BETWEEN 1904-1987 ON DISPLAY IN MUSEUM
- Has tower been moved? NO

**Previous Tower(s):** N/A

**Modern Tower?** NO

**Existing Sound Signal Building?** YES

- Year Constructed 1897
- Construction Materials

- Architectural Style
- Fog Signal Type VARIOUS

**Existing Keepers Quarters?** YES, CONVERTED TO BARN 1860

- Year Constructed 1838
- Number of Stories 2
- Architectural Style COLONIAL
- Construction Materials BRICK

**Other Structures:** 1860 KEEPERS QUARTERS, OIL HOUSE, STORAGE BUILDING, RADIOBEACON

**Current Use:** ACTIVE AID TO NAVIGATION/MUSEUM IN KEEPERS DWELLING

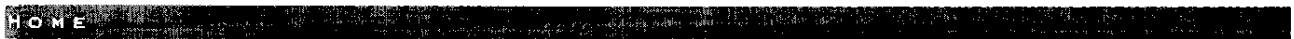
**Owner/Manager:** MONTAUK HISTORICAL SOCIETY W/USCG ACCESS TO OPTIC

**Open to the Public?** YES (Go to Lighthouses to Visit for access information)

**Web Site:** Link

**National Register Status:** LISTED, Reference #69000142  
Name of Listing MONTAUK POINT LIGHTHOUSE  
On State List/Inventory? NO, Year Listed

**Miscellaneous:**  
PRE-1800 TOWER AUTHORIZED BY GEORGE WASHINGTON, BUILT BY JOHN MCCOMB, JR , TOWER HEIGHT INCREASED 1860 TO ACCOMMODATE 1ST ORDER LENS, 1860 KEEPERS RESTORED, TOWER UNDER RESTORATION

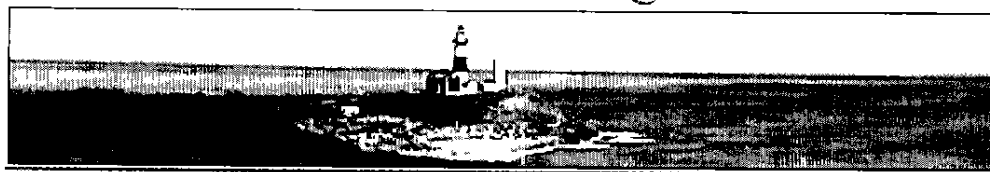


Last Modified Thu, Dec 12 2002 2 53 02 pm EDT  
JMP

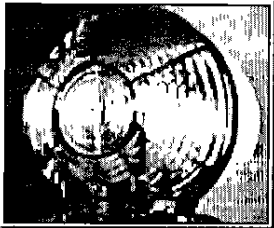

[Privacy & Disclaimer](#)

**ParkNet**  
National Park Service

# Montauk Point Lighthouse Web Site



Montauk, New York

Craft Shop	 <p>Historical Society</p> <p><b>LIGHTHOUSE WEEKEND</b> <b>August 23 &amp; 24, 2003</b></p> <p><b>SPRINT TRIATHLON &amp; RELAY RESULTS</b></p> <p> We are now accepting online donations to the Tower Restoration Fund or Lighthouse Donor Board</p> <p><i>Welcome to the Montauk Point Lighthouse, the oldest lighthouse in New York State. The Lighthouse was authorized by the Second Congress under President George Washington in 1792. Construction began on June 7, 1796 and was completed on November 5, 1796. This 100 foot tower has been part of Long Island's land and seascape for over 200 years and still serves as an active aid to navigation.</i></p> <p><i>This beautiful historic site plays frequent host to <b>wedding ceremonies</b> and other <b>special events</b>. <b>Group and school tours</b> (20 or more) are available on a year round basis at the Montauk Point Lighthouse <b>Museum</b>. For <b>information and reservations</b> please call our toll free number 1-888-MTK- POINT (toll free outside 631 area code only) or 631-668-2544</i></p> <p>Not able to connect? <b>175309</b> or this website</p>
Weddings	
Links	
Tower Restoration	
Events	
Guestbook	
Videos	
Pictures	
Museum	
Hours & Admission	
Tours	
Directions	
Lighthouse Keeper	
Lighthouse Fund	
Lighthouse Facts	
Eviction Control	
Historical Society	

**CONCERNED CITIZENS OF MONTAUK INC.**

PO BOX 915 MONTAUK, NEW YORK 11954

PHONE/FAX: 631-668-6473 • e-mail: CCOMNY@aol.com

*Environmental Organization Founded in 1970*

Peter Tannenwald  
Irwin, Campbell & Tannenwald, P. C  
1730 Rhode Island Ave, N. W., Suite 200  
Washington, DC 20036-3101

August 22, 2003

Dear Mr. Tannenwald,

Thank you for bringing to my attention the intention of Mr. Puopolo to set up a radio broadcast tower in Montauk. My organization, the Concerned Citizens of Montauk, has over seven hundred members and I can assure you that we are universally opposed to any additional towers or structures located in the proposed area. The far eastern tip of Montauk is dominated by two New York State parks (the lighthouse park and Camp Hero) and by the Theodore Roosevelt County Park. These are all prime wilderness areas. Whatever cold war era fixtures exist are outdated, no longer in use, and wherever possible they are being dismantled. The last thing these parklands need is the introduction of commercial radio operations.

Please keep me informed as to the status of this issue.

Bill Akin

President

Concerned Citizens of Montauk

**CERTIFICATE OF SERVICE**

I, Daniella K Mattioli Knight, do hereby certify that I have, this 25<sup>th</sup> day of August, 2003, caused to be sent by first class United States mail, postage prepaid, a copy of the foregoing "Comments of AAA Entertainment Licensing LLC" to the following:

Mr. Dana J Puopolo  
2134 Oak St , Unit C  
Santa Monica, CA 90405



Daniella K. Mattioli Knight